No. 16-1519

In the Supreme Court of the United States

SERGIO FERNANDO LAGOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PROFESSOR SHON HOPWOOD AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR PROFESSOR SHON HOPWOOD AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Shon Hopwood is an Associate Professor of Law at Georgetown University Law Center and the author of *Law Man: My Story of Robbing Banks, Winning Supreme Court Cases and Finding Redemption.*[1] Before attending law school, receiving a law license, serving as a judicial law clerk, and joining the legal academy, Professor Hopwood pleaded guilty to bank robberies and the use of a firearm during those robberies, and served nearly eleven years in federal prison.

Now, he studies and teaches criminal law, criminal procedure, and prisoner-rights law. Drawing on both his experience and his research, Professor Hopwood is also a prominent advocate of criminal-justice reform, including improvements to sentencing processes and outcomes.

This case directly implicates Professor Hopwood's interest in ensuring that criminal sentences do not undermine the justice system's objectives, including rehabilitating defendants and treating victims fairly.

SUMMARY OF ARGUMENT

Restitution awards for multimillion-dollar internal investigations neither requested nor required by the Government would create massive new criminal debt, thwarting rehabilitation and frustrating victims. Applying the Mandatory Victims Restitution Act (MVRA), 18 U.S.C.

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[1] As required by Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

3663A, to permit this result would not only flout the statute's text, it would quite literally prevent most defendants from paying their debts to society.

First, restitution awards exceeding a defendant's ability to pay impede rehabilitation. "From seeking and maintaining employment and housing, to obtaining public benefits, to meeting financial obligations such as child support, to exercising the right to vote, criminal justice debt is a barrier to individuals seeking to rebuild their lives after a criminal conviction." Alicia Bannon et al., Brennan Ctr. for Justice, *Criminal Justice Debt: A Barrier to Reentry* 27 (2010), https://perma.cc/97PT-4BPP. Yet because the MVRA requires courts to impose restitution even if the defendant cannot afford to pay it, allowing restitution for expensive, independent investigations would likely push defendants' debts past the breaking point. And defendants who are unable to pay their restitution debts face the prospect of violating the terms of their release and hence returning to prison.

Massive restitution awards are likely to be beyond the means of most white-collar defendants, too. The legal fees, costs, fines, and other expenses that accompany a white-collar defense and conviction leave even previously wealthy defendants with little money left. Some defendants can afford to pay a victim's medical bills or the wages lost from testifying in court; few can afford to pay the hourly fees of a large corporation's fleet of outside lawyers and consultants to investigate financial transactions for months if not years.

Second, these obstacles to rehabilitation and increased risk of recidivism would yield little benefit to victims, the justice system, or the public at large. As reflected by the staggering amount of federal restitution debt that is neither collected nor collectible, the MVRA would not efficiently or effectively compensate victims for multimillion-

dollar expenses like internal investigations. Large, unpaid awards also frustrate victims, who are more likely to be satisfied by smaller awards that defendants can actually afford to pay, and who lose respect for the courts when massive restitution awards are imposed but not collectable. Victims who wish to pursue compensation for big-ticket items like independent investigations can do so through the civil process, where victims—not the Government—control the pursuit and can determine whether pursuing a larger award is worthwhile given the defendant's ability or inability to pay.

In sum, imposing millions of additional dollars in restitution debt for internal investigations is likely to harm defendants, plunging them further into debt, preventing them from rejoining society, and making them more likely to commit new crimes. At the same time, restitution awards that are large yet uncollectable frustrate victims, who feel let down by the courts and who would be more satisfied with awards that are smaller yet collectible. And if Congress had nonetheless wanted the MVRA to harm both defendants and victims in this manner, it would have been clearer.

ARGUMENT

I. Massive restitution awards, including awards for expensive internal investigations, impede rehabilitation and make defendants more likely to commit new crimes.

Restitution awards often make it harder for defendants to rejoin society and leave them more likely to commit new crimes. Accordingly, expanding the MVRA to require restitution for multimillion-dollar internal investigations—investigations conducted outside the Government's criminal process—would inevitably thwart defendants' rehabilitation.

A. Unaffordable restitution awards thwart rehabilitation.

Although in certain circumstances, restitution orders can help to rehabilitate defendants, any such benefit is "lost when the restitution order exceeds the offender's financial means." Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687, 1704 (2009). When an award is beyond a defendant's ability to pay, it "becomes an obstacle to [the] defendant's rehabilitation." William M. Acker, Jr., *Making Sense of Victim Restitution: A Critical Perspective*, 6 Fed. Sent'g Rep. 234, 235 (1994). Yet because the MVRA requires courts to impose restitution whether or not the defendant can afford to pay it, 18 U.S.C. 3664(f)(1)(A), allowing restitution for expensive, independent investigations is likely to indebt defendants in a way that is substantial and unmanageable.

To begin, large restitution awards make it harder for defendants to find jobs, housing, transportation, and to otherwise become productive members of society. These tasks are difficult enough for those with criminal convictions; massive restitution debts make things more difficult still.

When a person has been convicted of a felony, he already faces punishment and struggle long after he has served his sentence and been released from custody. Experiencing what scholars call "civil death," a person emerging from custody as a convicted felon suffers from thousands of collateral consequences that "largely put that person outside the law's protection." Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1790 (2012). These collateral consequences include legal discrimination in employment, housing, education, and federal and

state benefits, in addition to potential disenfranchisement, loss of parental rights, ineligibility for student financial aid, revocation of professional and occupational licenses, and a host of other civil impairments. See, *e.g.*, Joy Radice, *The Reintegrative State*, 66 Emory L.J. 1315, 1330–1337 (2017); Chin, *supra*, at 1800–1801.

Given the collateral consequences and stigma faced by those previously convicted of crimes, "employment opportunities for ex-offenders are bleak." Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 Minn. L. Rev. 1837, 1850 (2014). Very bleak: Up to 60 percent of former prisoners are unemployed one year after they are released from prison. See Alicia Bannon et al., Brennan Ctr. for Justice, *Criminal Justice Debt: A Barrier to Reentry* 4 (2010), https://perma.cc/97PT-4BPP; see also Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 Wash. U. L. Rev. 45, 59–60 (2015) (collecting statistics). Those who do find jobs earn less money than those without criminal records. For example, a previously incarcerated white male makes an average annual salary of just over $12,000; that number is even lower for ex-offenders who are African-American or Hispanic. See Eaglin, *supra*, at 1851. People with criminal records also struggle to meet basic needs like stable housing. See, *e.g.*, Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 491–492 (2010); Bannon, *supra*, at 4.

For people confronting these challenges, massive restitution debt makes things even worse. A restitution order under the MVRA serves as a twenty-year "lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal

Revenue Code." 18 U.S.C. 3613(c). The Government may also file a writ of attachment on the defendant's property and a writ of garnishment on property and earnings. See 28 U.S.C. 3102–3104, 3205. Like a civil judgment, the federal restitution judgment also creates a lien on the defendant's real property. See 28 U.S.C. 3201. Thus, even if a defendant has the benefit of a realistic and manageable payment plan, the full judgment is likely to appear on the defendant's credit history.

Once a large restitution debt appears on a credit report, it often means "the denial of credit, housing, and employment opportunities." Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 Md. L. Rev. 486, 519 (2016). Employers, for instance, "increasingly use credit reports in their hiring decisions," Leah A. Plunkett, *Captive Markets*, 65 Hastings L.J. 57, 85 (2013), and are wary of hiring employees with significant debt, Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Soc. 1753, 1782 (2010). Poor credit makes it harder to rent an apartment, let alone finance a house, see Bannon, *supra*, at 27; those with criminal debt often struggle even to open a bank account, Harris, *supra*, at 1763. And defendants who hit rock bottom may not discharge federal restitution debts in bankruptcy. See, *e.g.*, 11 U.S.C. 523(a)(13) (discharge in Chapter 7 unavailable "for any payment of an order of restitution issued under title 18, United States Code").

In total, criminal-justice debt from unaffordable restitution awards leaves defendants "less able to meet other pressing needs, such as paying for rent, medicine, and food, or to financially support their children." Harris, *supra*, at 1778. In the face of these "difficult decisions about which bills to pay and which needs to meet in the face of a

financial shortfall each month," *id.* at 1778–1779, many defendants "rob Peter to pay Paul," *id.* at 1789 (quoting defendant).

For defendants unable to make scheduled restitution payments, things may get worse yet. If a missed restitution payment causes a defendant to violate probation or parole, she becomes ineligible for basic safety-net programs—including Temporary Assistance to Needy Families (TANF), the Supplemental Nutrition Assistance Program (SNAP), public housing, low-income housing assistance, and Supplemental Security Income (SSI) for the elderly and disabled. See 42 U.S.C. 608(a)(9)(A) (state may not use TANF grants to provide benefits to anyone "violating a condition of probation or parole imposed under Federal or State law"); 7 U.S.C. 2015(k)(1) (same for SNAP); 42 U.S.C. 1437d(*l*)(9) (same for public housing); 42 U.S.C. 1437f(d)(1)(B)(v) (same for low-income housing assistance); 42 U.S.C. 1382(e)(4)(A) (same for SSI).

These issues also affect defendants' family and friends, and may even dissuade defendants from getting married. For one, "[c]ollectors may seek recovery from jointly held assets and may even be able to garnish the earnings of a defendant's spouse." Sobol, *supra*, at 520. Even if their assets are not seized forcibly, "families and friends often provide the financial resources to prevent re-incarceration." *Ibid.* More generally, paying high monthly restitution bills can prevent defendants from supporting their families. See Lauren-Brooke Eisen, Brennan Ctr. for Justice, *Charging Inmates Perpetuates Mass Incarceration* 2 (2015), https://perma.cc/725J-6T7B ("Often, former inmates must depend on family members to pay the bills or are forced to prioritize criminal justice debt over other pressing needs such as feeding, clothing,

and housing family members who are reliant on their income.").

Bad enough on their own, the resulting poverty and joblessness also make former offenders more likely to commit more crimes. The economic literature reflects that "unemployment increases crime." Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. Chi. Legal F. 23, 26 n.12 (2010) (collecting sources). That, in turn, means new victims and yet more economic and social costs—borne by victims, defendants, their families, and taxpayers.

Even in the short run, defendants unable to pay massive restitution awards get stuck in the criminal-justice system, visiting court more often and facing the possibility of revoked probation and additional incarceration. See, *e.g.*, Harris, *supra*, at 1782–1784. A defendant's supervised release may be revoked if the court finds that "the defendant is in default on a payment of a fine or restitution," 18 U.S.C. 3613A(a)(1), and the defendant may be incarcerated if a court finds that he failed to pay "willfully," 18 U.S.C. 3614(b)(1). See generally *Bearden* v. *Georgia*, 461 U.S. 660, 668 (1983) (state may imprison probationer who has "willfully refused to pay the fine or restitution when he has the means to pay").

But when deciding whether a defendant's failure to pay restitution is "willful," "most courts employ a very loose interpretation of the 'willfulness' requirement." Cortney E. Lollar, *What Is Criminal Restitution?*, 100 Iowa L. Rev. 93, 128 (2014). In one case, a defendant's supervised release was revoked, based on a "willful" failure to pay restitution, despite testimony from her counselor that she was mentally ill and likely unemployable; the court of appeals upheld the order returning her to prison despite "her repeated attempts to obtain employment,

including self-referral to Missouri's Vocational Rehabilitation Service, and the impact her mental illnesses and physical problems have on her ability to find and keep a job." *United States* v. *Montgomery*, 532 F.3d 811, 813, 814 (8th Cir. 2008). In another case, the court held that a prisoner's failure to make quarterly restitution payments was willful—even though he had only 67 cents in his prison account—because he had twice received $50 from his family over the course of five to six months and had used those funds to buy hygiene supplies. See *United States* v. *Rogers*, No. CR08-0072, 2012 WL 3151564, at *1, *3 (N.D. Iowa Aug. 2, 2012) (magistrate report & recommendation), *adopted* 2012 WL 3689477 (N.D. Iowa Aug. 27, 2012).[2] In practice, then, the willfulness requirement does not always protect defendants from returning to prison if they cannot afford to pay.

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[2] Studies of state and local courts reveal similar disregard for a defendant's actual ability to pay. Some judges have deemed nonpayment to be "willful" based solely on the defendants' physical appearance—such as "expensive-looking clothing or tattoos" or "manicured nails"—without any information about the defendants' income. See Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 Yale L. & Pol'y Rev. 93, 102 (2015). Another judge "simply asked everyone if they smoked" and then deemed smokers' nonpayment to be willful and imprisoned them on that basis alone. Bannon, *supra*, at 21. Some local governments arrest first and then ask questions later. See *id.* at 23 ("In some jurisdictions, a missed payment automatically triggers an arrest warrant, while in others, clerks or probations officers regularly seek arrest warrants when individuals fall behind on payments.") (footnotes omitted). And a defendant with no money was jailed for nonpayment of a criminal debt based on unfounded speculation that "someone in [the defendant's] family should be able to make a payment." Am. Civ. Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* 19 (2010), https://perma.cc/FR55-H6AX. These examples are far from isolated. See, *e.g.*, *id.* at 32–33, 44–48, 57–58, 65–67.

These added bouts of incarceration then undermine rehabilitation even further. For "[e]ven a short stint in jail can lead to harmful consequences such as job loss, family disruptions, and interruptions in treatment for addiction, all of which create a situation ripe for new and more serious offenses." Bannon, *supra*, at 19.

Nor do payment schedules, authorized by 18 U.S.C. 3664(f)(2), protect defendants from unaffordable restitution judgments and resulting criminal punishment. Calculating a payment schedule is necessarily imprecise, and courts must measure not only the defendant's financial obligations and assets (including assets shared with others), but also the indeterminate "projected earnings and other income of the defendant." *Ibid.* In some (but not all) circuits, a trial judge may even delegate the payment schedule to a probation officer. See *Weinberger* v. *United States*, 268 F.3d 346, 359–60 (6th Cir. 2001) (upholding district judge's decision to "delegat[e] the schedule of payments to the Probation Office"); *United States* v. *Fuentes*, 107 F.3d 1515, 1528 n.25 (11th Cir. 1997) (same); see also Anders Sleight, Comment, *Probation Officers' Authority to Determine Conditions of Supervised Release and Restitution Payment: Fair or Foul?*, 22 Geo. Mason U. Civ. Rts. L.J. 117, 136–139 (2011) (describing circuit split). And throughout this process, the defendant bears "[t]he burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents." 18 U.S.C. 3664(e).

The result is a vicious cycle: Poverty leads to restitution debt, which leads to more criminal consequences, which lead to yet more poverty, which leads to yet more restitution debt, which leads to yet more criminal consequences.

It is no wonder that the "threat of incarceration for unpaid [legal financial obligations] may even encourage individuals to commit crimes to obtain funds to avoid incarceration." Sobol, *supra*, at 493. In a recent study in Alabama, for instance, 17 percent of participants admitted to committing crimes to raise money to pay criminal punishments. See Foster Cook, *The Burden of Criminal Justice Debt in Alabama: 2014 Participant Self-Report Survey* 11–12 (2014), https://perma.cc/Z8MD-L9L4. One defendant even "engineered a massive mail fraud scheme in order to pay a restitution order and thereby avoid a revocation of probation proceeding." Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 Fordham L. Rev. 507, 571 n.390 (1984) (citing statement by federal judge William T. Hodges).

However they address their restitution obligations, defendants "remain tethered to the criminal justice system—sometimes decades after they complete their sentences—and live under constant threat of being sent back to jail or prison, solely because they cannot pay what has become an unmanageable legal debt." Am. Civ. Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* 6 (2010), https://perma.cc/FR55-H6AX. Adding debt for costly internal investigations would aggravate these harms.

B. These concerns affect white-collar defendants as well.

Although most criminal defendants are poor, the consequences of large restitution awards—and the resulting barriers to rehabilitation—affect even white-collar defendants who had financial resources before they entered the criminal-justice system. Defendants who started out

with assets often lose them because of prosecution and conviction.

Unless they are indigent, criminal defendants pay for their lawyers. And because prosecutions for federal financial crimes typically are long, complex, and heavy on documents, defending them is expensive. See, *e.g.*, *United States* v. *Stein*, 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006) (tax-fraud case involved "at least 5 million to 6 million pages of documents *plus* transcripts of 335 depositions and 195 income tax returns"; "briefs on pretrial motions passed the 1,000-page mark some time ago"; and "[t]he government expects its case in chief to last three months") (emphasis in original). Under these circumstances, even the most experienced and efficient criminal lawyer cannot do her job "without spending a great deal of time, which translates into a great deal of money, sorting out the legal, factual, and intent issues." Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 Duke L.J. 857, 866 (2009).

Accordingly, a white-collar criminal defense may well cost over a million dollars. See, *e.g.*, *Stein*, 435 F. Supp. 2d at 362 n.163 ("It therefore is quite reasonable to assume that even a minimal defense of this [tax-fraud] case could well cost $500,000 to $1 million, if not significantly more."). Defenses in some cases have cost as much as $30 or $40 million. See, *e.g.*, Sara Kropf, *How to Pay for a White Collar Criminal Defense Lawyer—Part II*, Grand Jury Target: Tracking Federal Prosecutions of Corporate Executives (July 10, 2015), https://perma.cc/3N7X-XY6Z.

In practice, most corporate directors and officers cannot afford their criminal defenses unless indemnified by their employers. See Ribstein, *supra*, at 873; see also, *e.g.*, Paul Davies & David Reilly, *In KPMG Case, the Thorny Issue of Legal Fees*, Wall St. J. (June 12, 2007), (KPMG

executive prosecuted for financial fraud "sold his house" after employer stopped paying his legal fees). But defense fees typically are reimbursed only if the defense succeeds. See, *e.g.*, *Homestore, Inc.* v. *Tafeen*, 888 A.2d 204, 211 (Del. 2005) (citing Del. Code Ann. tit. 8, § 145(c)). For the same reason, defendants whose legal fees and costs were advanced typically must repay them if they are convicted. See, *e.g.*, *Farkas* v. *Nat'l Union Fire Ins. Co. of Pittsburgh*, 861 F. Supp. 2d 716, 720–722 (E.D. Va. 2012) (upon fraud conviction, former company chairman required to pay full $2.035 million in legal fees for criminal defense, including $928,977.59 advanced to him by insurer), *aff'd* 518 F. App'x 178 (4th Cir. 2013).

In most cases, then, a defendant facing restitution—that is, a defendant who has been convicted—will bear the cost of the criminal defense, no matter how expensive.

Even if a white-collar defendant has money left after paying his criminal lawyers, he likely will pay other major costs. There are forfeiture statutes, empowering "the Government to confiscate property derived from or used to facilitate criminal activity." *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1631 (2017); see also, *e.g.*, 18 U.S.C. 981(a)(1) (Government may seize assets "involved in," "derived from," or "traceable to" the crime). There are criminal fines, which may be imposed atop restitution awards. See, *e.g.*, *United States* v. *Cuti*, 720 F.3d 453, 455 n.1 (2d Cir. 2013) (defendant convicted of securities fraud was fined $5 million); *United States* v. *Cuti*, 708 F. App'x 21, 22, 25 (2d Cir. 2017) (upholding most of $6.25 million restitution judgment against same defendant). And there are civil suits arising from the same conduct: Here, GECC sued Lagos and a co-conspirator; the suit settled for over $33.5 million, plus interest, see J.A. 44–45; and to date,

Lagos has been able to pay only a fraction of that judgment, financed primarily by the sale of his home, *ibid.*

Needless to say, a white-collar defendant "may not have the resources to repay the company." Peter J. Henning, *The Mounting Costs of Internal Investigations*, N.Y. Times (Mar. 5, 2012), https://perma.cc/D43V-GQ4D. And in those circumstances, the pressure of massive yet unpayable restitution awards—and the accompanying obstacles to rehabilitation—is just as real.

C. Independent internal investigations are especially likely to produce massive, unaffordable restitution awards.

Expanding the MVRA to require restitution for massive internal investigations, including internal investigations neither requested nor required by the Government, would increase these problems dramatically. Compared to the items enumerated in the MVRA—"lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense," 18 U.S.C. 3663A(b)(4)—internal investigations cost far more. Companies can and often do spend hundreds of thousands or even millions of dollars on them. See Pet. Br. 26 (collecting examples). Here, in fact, the court ordered petitioner to pay over $4 million for GECC's internal investigation. See Pet. Br. 11.

Private investigations performed independently of the Government risk becoming especially sprawling and expensive. See, *e.g.*, *United States* v. *Papagano*, 639 F.3d 1093, 1095 (D.C. Cir. 2011) (after recovering nearly all of the stolen property, "the Laboratory then spent an additional $159,183.15 on an elaborate 3,500-hour internal investigation regarding property that was worth as little as

$120,000"). In 2015, the Assistant Attorney General for the Criminal Division explained that the Department of Justice places "a premium on targeted investigations." Eugene Illovsky, Morrison & Foerster LLP, *DOJ Provides "Best Practices" for Corporate Internal Investigations*, Harvard Law School Forum on Corporate Governance and Financial Regulation (June 28, 2015), https://perma.cc/4SYF-SQX7. Left to their own devices, however, companies are more likely to incur needless costs. As explained by the same Assistant Attorney General, "I've seen over the years, [a lot] of companies that did way too broad of an investigation and in my experience that was not the result of what DOJ told them to do." Mike Koehler, *Must See Video Clips from Assistant AG Caldwell's Recent FCPA Speech*, FCPA Professor (Nov. 7, 2016), https://perma.cc/A4QM-CAYM.

On the other hand, targeted investigations conducted at the Government's behest are more likely to be focused. Among other things, discussions with prosecutors can narrow seemingly broad subpoenas to more precisely target the information that is most helpful to the Government. See Melissa Maleske, *Conducting Internal Investigations: 8 Important Steps*, Law.com (Aug. 1, 2011), https://perma.cc/6RN3-AEYU. And companies have other tools to contain investigative costs. See, *e.g.*, Virginia A. Davidson & Fritz E. Berckmueller, *Running the Internal Investigation: Lessons from General Motors*, Bloomberg Law (Oct. 2, 2014), https://perma.cc/RCS9-EVZG.

If companies still want to boil the ocean, they may do so—if they are willing to finance the boilers. But as the MVRA's text reflects, those costs should not be shifted to criminal defendants, especially on pain of imprisonment and without regard to their ability to pay.

II. Unaffordable restitution awards harm victims, waste money, and diminish respect for the courts.

The barriers to rehabilitation and risks of recidivism caused by increased criminal debt are compounded by other harms—to victims, the justice system, and the public at large. The MVRA would not efficiently or effectively compensate victims for multimillion-dollar expenses like internal investigations.

Attempts to expand the MVRA must confront the unpaid elephant in the room: Most federal restitution debt is uncollected and uncollectible. In just over the first decade after Congress enacted the MVRA, federal criminal debt grew from $6 billion to over $50 billion; 80 percent of that debt was uncollected restitution. See Dickman, *supra*, at 1691–1692. Still, the size and proportion of unpaid debt continues to grow. According to the Government Accountability Office, by the end of fiscal year 2016, $110 billion in restitution was outstanding and $100 billion was "uncollectible" because "many offenders have little ability to pay the debt." U.S. Gov. Accountability Office, GAO-18-203, *Federal Criminal Restitution: Collections Could Be Improved* 25–26 (Feb. 2018), https://perma.cc/N9G2-C78Q.

Even defendants with earning power are less likely to work again if virtually all of their earnings will go to pay restitution awards indefinitely. In particular, defendants are less likely to make payments if they believe that their "best efforts at compensation will be inadequate." Stewart Macauley & Elaine Walster, *Legal Structures and Restoring Equity*, J. Soc. Issues 173, 178 (1971); see also Harris, *supra*, at 1780 ("The fact that legal debt often grew despite regular payments led some to feel so frustrated that they eventually stopped paying."). Case studies have likewise highlighted this dynamic in the similar context of criminal fines. See Beth A. Colgan, *Graduating*

Economic Sanctions According to Ability to Pay, 103 Iowa L. Rev. 53, 67–68 (2017). Ultimately, it is difficult to maintain the Sisyphean motivation to continue working and paying with no end in sight.

Meanwhile, imposing and enforcing restitution awards—and especially unpaid restitution awards—is itself expensive: "Each restitution order imposed by the courts increases administrative expenditures by approximately $400 to $500." Dickman, *supra*, at 1708. That number rises to $2000 once litigation and enforcement costs are added. See *ibid.* And the more criminal debt that cannot be paid, the higher the costs associated with enforcement, collection, related court hearings, and more incarceration. See Colgan, *supra*, at 70–72. Sometimes, imprisoning defendants for failing to pay debts costs even more than the value of those debts. See Roopal Patel & Meghna Philip, Brennan Ctr. for Justice, *Criminal Justice Debt: A Toolkit for Action* 6 (2012), https://perma.cc/C9SL-GH6E.

Compared to awards that are smaller and more affordable, large, unpaid awards are also more likely to upset victims. A pre-MVRA study revealed that victim satisfaction corresponds mostly to the percentage of the restitution award received, rather than to the size of the underlying award. See Robert C. Davis et al., *Restitution: The Victim's Viewpoint*, 15 Just. Sys. J. 746, 753, 754 (1992). Because the MVRA makes large and unpayable restitution awards the norm, however, "many victims end up feeling more disempowered and disillusioned with the criminal justice system than they would if they were given a realistic sense of how restitution works in practice." Lollar, *supra*, at 127. This leads to the dual harms of frustrated victims and disrespect for the justice system.

Restitution is especially ill-suited to cover large expenses because the restitution process is driven by the Government, not victims. It is the probation officer—not the victim—who presents to the court "a complete accounting of the losses to each victim." 18 U.S.C. 3664(a). If the probation officer requests it, it is the prosecutor, after consulting "to the extent practicable" with the victim, who provides the probation officer with the amounts subject to restitution. 18 U.S.C. 3664(d)(1). Although the victim has an opportunity to offer more information and an affidavit to the probation officer, 18 U.S.C. 3664(d)(2)(A), it is ultimately "the attorney for the Government"—not the victim—responsible for establishing the amount of the victim's losses, see 18 U.S.C. 3664(e).

Most notably, "[v]ictims are not promised that they can offer evidence, except by affidavit, or informed how to disagree with the restitution amount suggested by the probation officer or with the amount set forth in a plea agreement to which they are not a party." William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will the Courts Say So After* Southern Union *v.* United States*?*, 64 Ala. L. Rev. 803, 813–814 (2013). Indeed, victims do not become parties to the criminal proceeding and may not appeal restitution awards that they think are too small. See *United States* v. *Kovall*, 857 F.3d 1060, 1063 (9th Cir. 2017) (joining "the First, Third, Fifth, Eighth, and Tenth Circuits in holding that a victim may not directly appeal the restitution component of a criminal defendant's sentence under the Mandatory Victims Restitution Act"). A recipe for satisfied victims this is not. Cf. Davis, *supra*, at 755 (pre-MVRA study "found that victims often had little involvement in decisions about the size of awards, received little information

about the collection process, and were largely dissatisfied with various aspects of their restitution experiences").

If, on the other hand, a victim wishes to pursue compensation for significant expenses caused by the defendant's conduct, and if she believes that the defendant would be able to pay such a judgment, then she can file a civil suit against that defendant. In a civil case, the victim—not the Government—would drive the train: The victim would decide how much money to demand, what evidence to present, whether to appeal an adverse decision, and how many resources to devote to enforcing a judgment. Defendants, for their parts, would receive procedural protections unavailable at criminal sentencing, "including the right to a jury, the right to call and cross-examine witnesses, and the protection provided by the rules of evidence." Slavin & Sorin, *supra*, at 535 (footnotes omitted). This process would be fairer to both sides, and more likely to leave victims satisfied by the result and confident in the justice system. And victims would pursue such civil awards only when it would make sense to do so—that is, when a defendant could actually afford to pay a large judgment.

In sum, respecting the MVRA's textual limits would promote defendant rehabilitation, victim satisfaction, and respect for the justice system writ large. Automatically charging criminal defendants for multimillion-dollar internal investigations, no matter what their ability to pay, would not.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2018